No. 91-2024

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

—v.—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, NEW YORK CIVIL LIBERTIES UNION, PEOPLE FOR THE AMERICAN WAY, AND UNION OF AMERICAN HEBREW CONGREGATIONS, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. THE SPECIFIC FACTS OF THIS CASE DO NOT PRESENT A CLASH BETWEEN THE ESTABLISHMENT CLAUSE AND PETITIONERS' FREE SPEECH CLAIMS 8

II. DENYING ACCESS TO LAMB'S CHAPEL CANNOT SURVIVE SCRUTINY UNDER *PERRY* 10

A. Prohibiting Speech "For Religious Purposes" Is Impermissible Viewpoint Discrimination 10

B. The Government May Not Limit The Subjects That May Be Discussed In A Designated Public Forum Except To Allow A Government Body To Perform Its Official Functions 14

III. RESTRICTIONS ON SPEECH SHOULD BE JUDGED BY THE NATURE OF THE GOVERNMENT'S INTEREST AND NOT BY THE ARTIFICIAL CATEGORIZATION OF ITS PROPERTY 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 5, 8

Boos v. Barry, 485 U.S. 312 (1988) 13

Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) 4

Calash v. City of Bridgeport, 788 F.2d 80 (2d Cir. 1986) 4, 5, 6

City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976) 5, 6

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 15

Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. 788 (1985) 5, 11, 13, 17, 20

Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York, 852 F.2d 676 (2d Cir. 1988) 4, 5, 6

Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79 (2d Cir. 1991) 4

Page

Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371 (5th Cir. 1989) 19

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) 8

Grayned v. City of Rockford, 408 U.S. 104 (1972) 8, 16, 19

Greer v. Spock, 424 U.S. 828 (1976) 17

Hague v. CIO, 307 U.S. 496 (1939) 17

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 19

International Society of Krishna Consciousness, Inc. v. Lee, __ U.S. __, 112 S.Ct. 2701 (1992) . . . . . *passim*

Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 296 (1990) 5

Lee v. Weisman, __ U.S. __, 112 S.Ct. 2649 (1992) 6, 8, 9

Lemon v. Kurtzman, 403 U.S. 603 (1971) 9

May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986) 12, 13

McCollum v. Board of Education, 333 U.S. 203 (1948) 8, 10

Page

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 11, 13

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) . . . . . *passim*

Plyler v. Doe, 457 U.S. 202 (1982) 16

Police Dep't v. Mosley, 408 U.S. 92 (1972) 15

Simon & Schuster v. Members of the New York State Crime Victims Board, __ U.S. __, 112 S.Ct. 501 (1992) 13, 16

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 12

Texas Monthly v. Bullock, 489 U.S. 1 (1989) 10

Travis v. Owego-Appalachian School District, 927 F.2d 688 (2d Cir. 1991) 3, 4

Trietley v. Board of Education of the City of Buffalo, 409 N.Y.S.2d 912 (4th Dep't 1978) 3, 10

United States v. Kokinda, __ U.S. __, 110 S.Ct. 3115 (1990) 5, 13, 17, 18

White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990) 14

Widmar v. Vincent, 454 U.S. 263 (1981) . . . . . *passim*

Page

Statutes

New York Education Law §414 . . . . . 3, 4

Other Authorities

Farber & Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication," 70 Va.L.Rev. 1219 (1984) 17

Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 U.C.L.A. L.Rev. 1713 (1987) 19

Stone, "Content-Neutral Restrictions," 54 U.Chi.L.Rev. 46 (1987) 17

Tribe, L., AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 17

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. This case involves two issues of central concern to the ACLU. On the one hand, the ACLU is committed to the separation of church and state. On the other hand, the ACLU is committed to a system of free expression that does not discriminate based on the content of speech. In our view, the proper accommodation of these two constitutional principles necessarily turns on the facts. In this particular case, we are persuaded that the Establishment Clause concerns are minimal. We are also persuaded that the decision below undervalued the free speech interests at stake. Accordingly, we submit this brief as *amicus curiae* in support of petitioners.

Americans United for Separation of Church and State (Americans United) is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United is composed of some 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the long-standing American principle of church-state separation. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court. While Americans United believes that public schools should remain free from religious control and influence, it be-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

lieves that this case does not present a threat to this established principle.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has frequently represented parties and filed *amicus* briefs in litigation seeking to defend First Amendment rights, including the rights of free expression and separation of church and state. While People For recognizes that Establishment Clause problems may often be presented when religious speech or activities occur in public school facilities, the facts of this case do not raise such concerns. People For has obtained consent to file an *amicus* brief in this case in order to help vindicate the important First Amendment principles which are at stake, particularly the principle that government cannot properly exclude speech activities from forums such as the school auditorium in this case based on their religious or other content.

The Union of American Hebrew Congregations (UAHC) is the congregational arm of the Reform Jewry, comprising 850 synagogues with a membership of over 1.5 million Jews in the United States. For over the one hundred years of its existence, the UAHC has been a passionate advocate for protecting and strengthening the religion clauses of the First Amendment as the indispensable tools for preserving religious liberty. It has long held that vigorous enforcement of the Establishment Clause is the most effective method for ensuring that religion can flourish free of government control and regulation.

STATEMENT OF THE CASE

Petitioners, Lamb's Chapel and Pastor John Steigerwald ("Lamb's Chapel"), sought permission to use the Center Moriches High School auditorium to show, for viewing by members of the community at large, a series of films addressing contemporary family issues from a religious perspective. The church proposed to show the series during five weekday evenings over a five-week period.[2]

Respondent Center Moriches Union Free School District, relying on New York Education Law §414 and a local implementing rule, denied Lamb's Chapel permission to use the high school auditorium to show the film series. The basis for the denial of access was not the subject matter of the films -- contemporary family issues -- but their religious perspective.

Under Education Law §414, local school boards are allowed to open school facilities to the community for educational, civic, recreational and social purposes. These enumerated purposes have been held not to include use for religious purposes. *Trietley v. Board of Education of the City of Buffalo*, 409 N.Y.S.2d 912, 915 (4th Dep't 1978).[3]

Applying this Court's precedents as interpreted by the Second Circuit in its own prior decisions, the court

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[2] The film series ("Turn Your Heart Toward Home") is described in a brochure reproduced in the Joint Appendix (J.A.) at pp.85-89. Lamb's Chapel previously had sought to use the school's facilities for Sunday morning services. That request was denied. The church has not challenged the denial of that request and the school district's denial of the request is not before the Court in this case. *See* Cert. Pet. at 5 n.2.

[3] *But see Travis v. Owego-Appalachian School District*, 927 F.2d 688 (2d Cir. 1991)(school board required to allow use of school auditorium for religious fund-raiser, despite Education Law §414, because similar activities had been permitted in the past).

of appeals held that the school district's action did not violate the First Amendment. The court ruled that the school district had opened its facilities for use as a "public forum" but had done so only with respect to the uses enumerated in Education Law §414. Because the school district had not opened its facilities to use for religious purposes, the court held that it was not required to do so here. The court, however, did not identify any independent factor justifying the state's refusal to allow access to its facilities for religious purposes. Treating as plenary the government's power to define the extent to which its property may be used as a public forum, the court deemed the fact of the religious exclusion to be sufficient justification for the exclusion.[4]

As its earlier cases make clear, the Second Circuit's decision was derived from this Court's statement in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983), that "[a] public forum may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n* (school board business)".[5] As the Second Circuit interpreted this principle, the government may designate its property as a public forum for limited purposes without having to justify those limits.

The court stated that its decision was not inconsistent with *Widmar v. Vincent*, 454 U.S. 263 (1981), or *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), because the school authorities in those cases had established a "generally open forum" for student use and because students "have a greater claim on the use of school property than outsiders." *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 388-89 (2d Cir. 1992). According to the court, the instant case involves, by contrast, "outside organizations seeking access where access has been limited and all religious use has been barred by policy and practice." *Id.* at 389.

SUMMARY OF ARGUMENT

The question of when a religious group's use of government property presents a valid claim of equal access, *see, e.g.*, *Mergens*, 496 U.S. 226, and when, instead, granting it access crosses the line into government endorsement of religion, *see, e.g.*, *Kaplan v. City of Burlington*,

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[4] The cases that the Second Circuit relied on had not actually upheld a prohibition on a religious use of school property. In addition to *Travis*, *see* n.2 *supra*, the court of appeals cited *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79 (2d Cir. 1991)("Deeper Life II") (dismissing as moot a church's challenge to a school board's denial of a request to use a public school auditorium temporarily for religious meetings on Sundays), and *Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York*, 852 F.2d 676 (2d Cir. 1988)("Deeper Life I")(affirming a preliminary injunction requiring school board to permit temporary use of a school auditorium on Sundays in light of board's past practice of granting permits to other religious organizations). The Second Circuit relied in *Deeper Life I* on its earlier decision in *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986)(denying concert promoter access to municipal stadium for rock concert on the ground that the stadium was not a public forum). *Compare Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980)(Establishment Clause compelled school board's refusal, pursuant to Education Law §414, to allow joint prayer sessions in a public high school before classes began but during school hours), *cert. denied*, 454 U.S. 1123 (1981).

[5] *Deeper Life I*, 852 F.2d at 679-80; *Calash*, 788 F.2d at 82, 84. This principle was repeated, without the illustrative citations, in *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 802 (1985)("[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."). The same conditions on access may be imposed in a nonpublic forum. *See id.* at 806; *United States v. Kokinda*, __ U.S. __, 110 S.Ct. 3115, 3121-22 (1990).

891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 296 (1990), is often a difficult one to answer. The determination turns on issues of context that necessarily are fact-specific, and the constitutional calculus inevitably changes as the religious presence on public property becomes more pervasive. *See Widmar*, 454 U.S. at 273-74.

Here, we are persuaded that granting the access that Lamb's Chapel seeks is unlikely to be perceived as a government endorsement of religion. Lamb's Chapel seeks access to the school during nonschool hours when the school building is the functional equivalent of a municipal auditorium or hall. Consequently, this record does not present the special problems associated with mingling religion and school. *See Lee v. Weisman*, __ U.S. __, 112 S.Ct. 2649, 2655 (1992). Moreover, the access that Lamb's Chapel seeks does not appear to be significantly different, either in quality or quantity, from the access granted to other community groups. Like the Second Circuit, therefore, we approach this case primarily from a free speech perspective. From a free speech perspective, we are convinced that the decision below is seriously flawed and should be reversed.

When this Court stated in *Perry* that "[a] public forum may be created . . . for the discussion of certain subjects," 460 U.S. at 46 n.7, it was making a very modest, commonsense point -- that the First Amendment does not prevent the government from insisting that persons who wish to address a public body at a public meeting stick to the business at hand. A public body could not do its work if those claiming its attention were free to speak at any time on any subject. For that reason, "public bodies may confine their meetings to specified subject matter." *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976).

The Second Circuit, first in *Calash* and then in *Deeper Life I*, and finally in this case, transmuted this

very modest principle into a rule that tolerates viewpoint discrimination in the designation of a public forum, allowing the government to limit speech on the basis of the speaker's purpose and perspective. Thus, under the Second Circuit's decision, Lamb's Chapel may not show films addressing contemporary family issues because it proposes to address those issues from a religious perspective and to convey a religious message in doing so. Such viewpoint discrimination is impermissible in a public or nonpublic forum.

The court of appeals further misinterpreted the principle stated in *Perry* as imposing no obligation on the government to *justify* the limitations that it seeks to impose on speech in a designated public forum. So far as the Second Circuit was concerned, the fact that the government had not chosen to allow religious expression in a designated public forum was the reason the expression did not have to be permitted. Thus, Lamb's Chapel was forbidden to show its films at a time when the school property in question was not being used for any other purpose with which the petitioners' proposed activity would have been inconsistent. Their proposed activity, in fact, was inconsistent with only one thing -- the exclusion of religious speech from school facilities. Exclusion for the sake of exclusion is impermissible even in a nonpublic forum.

The decision below underscores, once again, the central flaw of the *Perry* test -- its tendency to serve as "a jurisprudence of categories rather than ideas," *International Society of Krishna Consciousness, Inc. v. Lee*, __ U.S. __, 112 S.Ct. 2701, 2715 (1992)(Kennedy, J., concurring in the judgment), encouraging a narrow focus on the correct application of a mechanistic formula rather than the protection of basic First Amendment freedoms.

Amici respectfully submit that the *Perry* test should be replaced by a functional test requiring the government to show that the expression it seeks to exclude

from its property is "basically incompatible with the normal activity of [the] particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). The government certainly must provide more of a justification for limiting speech on its property than the mere fact that it has chosen to do so. Regardless of whether the *Perry* test is modified, the decision below should be reversed on free speech grounds.

ARGUMENT

I. THE SPECIFIC FACTS OF THIS CASE DO NOT PRESENT A CLASH BETWEEN THE ESTABLISHMENT CLAUSE AND PETITIONERS' FREE SPEECH CLAIMS

In previous cases, this Court has recognized that serious Establishment Clause problems may be presented when public school facilities are used for expressive purposes related to religion. "The public school is at once the symbol of its democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools." *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948)(Frankfurter, J. concurring). Where use of public school facilities or personnel for religious purposes would convey a message of official support for religion or confer on a church more than incidental benefits, for example, this Court has indicated that the result would violate the Establishment Clause.[6] Indeed, this Court has specifically noted that complying with a public school authority's constitutional obligations under the Establishment Clause may constitute a compelling interest justifying restrictions on speech and expression. *Widmar v. Vincent*, 454 U.S. at 271.

[6] *See Weisman*, 112 S.Ct. 2649; *id.* at 2672-76 (Souter, J., concurring); *Mergens*, 496 U.S. at 248 (plurality opinion); *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985); *Widmar*, 454 U.S. at 273-74.

Although this case concerns use of public school facilities for religiously oriented speech, Establishment Clause dangers are not present on the facts of this case. The proposed use of the public school facilities here is limited, occasional, and comparable to other uses already permitted by Center Moriches. Lamb's Chapel wishes to use the high school auditorium once a week for five weeks. The use would occur in the evenings, well after school hours. The activity is not uniquely religious, like worship or prayer, nor is it addressed only to the faithful; it is, instead, a discussion of a subject of general interest, albeit from a religious perspective, addressed to the whole community.[7] The activity would not be promoted by the school. Moreover, the school district has authorized frequent use of school facilities by many other outside groups to pursue their own diverse interests -- for example, the Manorville Humane Society, the Moriches Bay Civic Association, the Holiday Beach Property Owners Association, and the Committee on the Busing Vote. *See* Cert.Pet. at 4 & n.1.

Under these specific circumstances, *amici* do not believe that petitioners' use of the school facilities would violate the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 603 (1971). As in *Widmar*, there clearly is a secular purpose in the school district's allowing petitioners to use its facilities. *See Widmar*, 454 U.S. at 275. In addition, the benefit to religion is truly incidental and there is no realistic danger that students or community

[7] As noted, Pastor Steigerwald had previously requested use of school facilities to conduct Sunday morning church services, but he has not renewed or contested the denial of that request, and that issue is not before this Court. *See* Cert.Pet. at 5 n.2. *Cf. Weisman*, 112 S.Ct. at 8656 (discussing significance of conduct of overtly religious exercise at school function on school property). For the reasons stated above, such a request would pose more serious Establishment Clause problems.

members could perceive that the school district is endorsing religion. *Id.* at 276-77. Moreover, there is no risk of undue entanglement with religion under the circumstances of this case.

It is important to recognize that different circumstances, such as use of school facilities for religious purposes at 3:45 p.m. or every Sunday morning for church services, could well lead to a different result. *Cf. Trietley*, 409 N.Y.S.2d at 916-17 (even if state law permitted school facilities to be used for religious purposes under some circumstances, the Establishment Clause would preclude use for meetings of student bible clubs to be supervised and moderated by school staff members during nonschool hours). But Lamb's Chapel does not seek special access to Center Moriches students during the school day. *See McCollum v. Board of Education*, 333 U.S. 203. It is not seeking any special privilege not otherwise available or afforded to secular groups, and it would not be granted any unique benefit or advantage if allowed access. *See Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

In short, in this instance, as in *Widmar*, this Court can and should decide the case based on free speech principles and not reach the questions that would arise if Establishment Clause concerns were present. *Widmar*, 454 U.S. at 273 n.13. On that basis, as we explain below, the decision of the court of appeals was erroneous and should be reversed.

II. DENYING ACCESS TO LAMB'S CHAPEL CANNOT SURVIVE SCRUTINY UNDER *PERRY*

A. Prohibiting Speech "For Religious Purposes" Is Impermissible Viewpoint Discrimination

In upholding the school district's refusal to grant Lamb's Chapel access to its facilities in this case, the

Second Circuit ultimately relied on the principle that the government may designate a public forum limited to "the discussion of certain subjects." *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 46 n.7. But the court's reliance on this principle was misplaced. Lamb's Chapel was denied access to the school district's facilities not because of the "subject" it wished to discuss -- "the protecting and strengthening of family relationships" (J.A.86) -- but because it wished to discuss that subject from a religious perspective. Petitioners have been denied access to the school's facility's "because of the views that they express." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Such discrimination is forbidden *regardless* of whether the forum is public or nonpublic in nature. Thus, this Court has stated that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." 473 U.S. at 806. As Justice Brennan explained in his dissenting opinion in *Perry*:

> Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not . . . . We have never held that the government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that

> discriminates among viewpoints threatens the continued vitality of "free speech."

460 U.S. at 61-62.

It is undisputed that one of the church's purposes in presenting its film series was to convey a religious message. But nothing in this Court's precedents suggests that government may limit access to a designated public forum, to address a subject that other speakers may address, based on a speaker's purpose in addressing that subject. To the contrary, this Court has held squarely that a speaker may *not* be denied access to a designated public forum because of the speaker's views. *City of Madison Joint School District*, 429 U.S. at 175-76. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-56 (1975).

The school district and the New York State Attorney General suggest that the policy applied in this case is viewpoint neutral because it excludes *all* religious speech -- all speech "for religious purposes" -- and not just the particular religious viewpoint espoused by Lamb's Chapel.[8] But it is, in fact, the exclusion of religious speech as such from facilities open to speech presenting nonreligious (or even antireligious) perspectives that constitutes the forbidden viewpoint-discrimination in this case.

The distinction between "religious" and "nonreligious" speech is a distinction based directly and inescapably on the speaker's viewpoint. It turns on whether or not the speaker promotes religion in some respect, or is neutral or hostile to religion instead. *See Widmar*, 454 U.S. at 271 n.9. *See also May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986)(Posner, J.)(prohibiting religious speech in public or nonpublic forum where other speech is allowed "would be a restriction discriminating against a particular point of view and would therefore flunk the test . . . [of] *Cornelius*, provided that the defendants have no defense based on the establishment clause").[9] That the exclusion covers all religious viewpoints scarcely makes it less viewpoint-based, although it does elevate the discrimination to a higher and more inclusive level of generality. "[T]he First Amendment forbids the government to regulate speech in ways that favors some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804.[10]

Cornelius, cited by the Attorney General, is not to the contrary. The Court in that case upheld a policy denying "advocacy groups" access to the Combined Federal Campaign (CFC). It held that such a denial was not viewpoint based. For the reasons discussed above, the school district's prohibition of speech "for religious purposes" is viewpoint based. But even if the school district's prohibition were regarded as simply content-based, *see Boos v. Barry*, 485 U.S. 312, 319 (1988), and hence permissible in a *nonpublic* forum such as the CFC, content-based exclusions from the school facilities involved in this case, which have been designated for use as a *public* forum, require compelling justification to survive. *Lee*, 112 S.Ct. at 2705; *Kokinda*, 110 S.Ct. at 3119; *Perry*, 460 U.S. at 46.

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[8] *See* Op.Cert. of Defendants-Respondents at 8; Op.Cert. of Respondent Attorney General at 12.

[9] "[E]ven in a non-public forum, the government's interest in interfering with the free market in ideas through discriminatory restrictions on particular points of view (such as the religious) is slight, and the potential injury to this important market significant." *Id.*

[10] It is immaterial, of course, whether the government was motivated by hostility toward religious viewpoints. "'Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster v. Members of the New York State Crime Victims Board*, __ U.S. __, 112 S.Ct. 501, 509 (1992)(citation omitted).

B. The Government May Not Limit The Subjects That May Be Discussed In A Designated Public Forum Except To Allow A Government Body To Perform Its Official Functions

Even assuming that the school district's denial of access in this case was based on the fact that Lamb's Chapel had proposed to address a "subject" to which the school facilities had not been opened for discussion, the Second Circuit misapplied this Court's precedents in failing to require New York to justify the exclusion of that subject from those permitted to be discussed. In failing to require the state to justify the exclusion, the court effectively granted the government "authority to restrict speech by fiat." *Lee*, 112 S.Ct. at 2715 (Kennedy, J., concurring).

As noted, the principle allowing the government to create a public forum limited to the discussion of certain subjects merely recognizes the reality that a government body would be unable to perform its official functions if it could not maintain control over its own agenda. The Ninth Circuit made the point in a recent case:

> [A] City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact . . . . [I]n dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand.[11]

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[11] *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. (continued...)

Aside from occasional school-related meetings (to which meetings of outside groups must give way), Center Moriches High School performs no government functions during weekday evenings. It performs no business with which showing "Turn Your Heart Toward Home" would be inconsistent. The principle ultimately relied on by the Second Circuit in this case to restrict speech -- a principle designed to permit a government body to do its job -- simply does not apply.

New York State has generally opened its school facilities for expressive activity by outside groups, just as the university in *Widmar* had generally opened its facilities for expressive activity by student groups. Limitations on access to those school facilities thus bear "a heavy burden of justification." *Widmar*, 454 U.S. at 268. Regulations limiting speech on property designated for use as a public forum are "subject to the same limitations as that [*sic*] governing a traditional public forum." *Lee*, 112 S.Ct. at 2705. "Such regulations survive only if they are narrowly drawn to achieve a compelling state interest." *Id. See also Police Dep't v. Mosley*, 408 U.S. 92, 98-99 (1972)("justifications for selective exclusions from a public forum must be carefully scrutinized"). There is no suggestion that the school district's denial of access to Lamb's Chapel in this case could remotely satisfy this stringent test.

Even if the Center Moriches facilities were consid-

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[11] (...continued)
1990)(footnotes omitted). Or, as Justice Stevens has observed:

> Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to say that a "time, place, or manner restriction may not be based upon either the content or subject matter of speech."

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 544-46 (1980)(Stevens, J., concurring in the judgment)(citation omitted).

ered to be a nonpublic forum, restrictions on speech in such a forum must themselves satisfy a requirement of reasonableness. *See Lee*, 112 S.Ct. at 2705, 2708. To survive, a limitation on speech in a nonpublic forum must be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 49. This test would be entirely circular, however, if it is the government's decision to open the forum to speech only for specified purposes that makes the exclusion of other speech "reasonable." To admit such a "circular defense" would be to allow the government to "sidestep judicial review." *Simon & Schuster*, 112 S.Ct. at 510. *Cf. Plyler v. Doe*, 457 U.S. 202, 227 (1982)("the State must do more than justify its classification with a concise expression of an intention to discriminate").

As Justice O'Connor suggested in her concurring opinion in *Lee*, the government should be required to offer some "independent reason" for limiting speech even in a nonpublic forum -- to make some showing that the expressive activity at issue is "incompatible" with the nature and function of the forum. 112 S.Ct. at 2714.[12] No such "independent reason" or functional justification -- sufficient or insufficient -- has been offered for the exclusion of religious speech from school facilities in the circumstances of this case.

[12] *See id.* at 2718 (Kennedy, J., concurring)(considering "compatibility" in determining whether forum is public); *id.* at 2724-25 (Souter, J., concurring)(same, *citing Grayned v. City of Rockford*, 408 U.S. 104, 116).

III. RESTRICTIONS ON SPEECH SHOULD BE JUDGED BY THE NATURE OF THE GOVERNMENT'S INTEREST AND NOT BY THE ARTIFICIAL CATEGORIZATION OF ITS PROPERTY

For the reasons stated above, *amici* believe the decision below is inconsistent with current public forum doctrine. More fundamentally, however, *amici* believe that the decision below illustrates basic shortcomings in public forum law, at least as that law has been understood and applied by numerous courts around the country.[13]

As initially conceived, public forum law was designed to enhance free speech opportunities. *See Hague v. CIO*, 307 U.S. 496, 515-16 (1939)(Roberts, J.). Through an evolutionary process, it has ceased to perform that speech-enhancing role. Indeed, to the contrary, public forum law increasingly has become a ceiling, rather than a floor, on the exercise of First Amendment rights, "serv[ing] to obfuscate rather than clarify the issues at hand." *Kokinda*, 110 S.Ct. at 3127 (Brennan, J., dissenting). As a result, public forum law no longer provides meaningful guidance to lower courts, public officials or those seeking to exercise their First Amendment rights on public property.

It is not surprising, therefore, that this case marks the third time in as many years that the Court has been called upon to clarify the contours of public forum law.

[13] The public forum doctrine has been the subject of considerable criticism, both by members of this Court and by legal scholars. *See, e.g., Cornelius*, 473 U.S. at 813 (Blackmun, J., dissenting); *id.* at 833 (Stevens, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976) (Brennan J., dissenting). *See also* L. Tribe, American Constitutional Law 992-93 (2d ed. 1988); Stone, "Content-Neutral Restrictions," 54 U. Chi.L.Rev. 46, 93-94 (1987); Farber & Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication," 70 Va.L.Rev. 1219, 1220-24 (1984).

Lee, 112 S.Ct. 2701; *Kokinda*, 110 S.Ct. 3115. The very frequency with which the issue is arising is an indication of serious doctrinal problems. Unfortunately, the decision below also demonstrates that the problems with *Perry* go beyond mere ambiguity. In our view, the conceptual framework of *Perry* suffers from a central inconsistency that the facts of this case have clearly exposed.

On the one hand, *Perry* holds that the government may create a "designated public forum" by opening its property for expressive use and that, having created a designated public forum, the government may not discriminate on the basis of content. 460 U.S. at 45-46. On the other hand, *Perry* also has been read as standing for the proposition that the government may create a "limited" public forum from which certain speech is excluded because of its content.[14]

These two propositions are logically irreconcilable when, as here, the universe of included speech dwarfs the universe of excluded speech. Under these circumstances, there is no principled way to determine whether the excluded speech is on the wrong side of the forum's limiting definition (in which case the constitutional claim fails) or whether the excluded speech is the subject of content discrimination in a designated public forum (in which case the constitutional claim succeeds).

The Second Circuit fell into the trap set by *Perry* when it stated that "the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." 959 F.2d at 386. If the state can justify content discrimination in a "designated public forum" simply by relabeling it a "limited" forum -- open to all speech except that which is excluded -- then the exception effectively has swallowed the rule. *See generally* Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 U.C.L.A. L. Rev. 1713, 1756-57 (1987).

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[14] This confusion, we respectfully submit, was only perpetuated in *Lee*, 112 S.Ct. at 2705, when the Court described the second category of property under *Perry* as:

> the designated public forum, whether of a limited or unlimited character -- property that the state has opened for expressive activity by part or all of the public . . . . Regulation of such property is governed by the same limitations as that [*sic*] governing a traditional public forum.

Amici have no quarrel with the insight that free speech rights are intertwined with the nature and function of the property to which access is sought. But nearly a decade after *Perry*, it is abundantly clear that the constitutional inquiry compelled by the First Amendment must be more nuanced than the rigid taxonomy that *Perry* prescribes. In undertaking this reevaluation, it is immaterial whether the "formulaic" approach that *Perry* has spawned, *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 (5th Cir. 1989), is a fair reading of *Perry*'s original intent or a misinterpretation. The time has come to refocus attention on the essential First Amendment question posed by the public forum cases: has the state presented an adequate justification for curtailing speech at a particular location at a particular time? Moreover, that question can best be answered, as this Court has recognized in the past, by requiring the government to demonstrate that "the characteristic nature and function of the particular forum," *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), are "basically incompatible" with the speech the government seeks to ban, *Grayned v. City of Rockford*, 408 U.S. at 116.

Last Term's decision in *Lee* represented an important step toward reinvigorating this functional analysis. Indeed, a strong argument can be made that a majority of this Court already has turned away from the "jurisprudence of categories" that *Perry* seemingly favors. Justice

O'Connor's concurring opinion, which was decisive to the outcome in *Lee*, carefully stressed that any restriction on speech "must be assessed in light of the purpose of the forum and all the surrounding circumstances." 112 S.Ct. at 2712, *quoting Cornelius*, 473 U.S. at 809.

Justice Kennedy's opinion, which was joined in this regard by Justices Blackmun, Stevens and Souter, was even more explicit:

> If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important consideration is whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case . . . .

Lee, 112 S.Ct. at 2718.

The decision below was decided without the benefit of this Court's opinions in *Lee*. However, the Second Circuit's approach suffers precisely the defect that Justice Kennedy described in *Lee* when he wrote: "[T]he critical step in the [c]ourt's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty

to respect the speech its citizens can voice there." *Id.* at 2716.

Had the Second Circuit focused instead on the functional question of whether the use of the school facilities proposed by Lamb's Chapel "would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property," *id.* at 2718, there is little doubt that the outcome would have been different. At the very least, the Second Circuit would have focused on the far more relevant issue of whether the proposed use of the property violates the Establishment Clause. If the answer to that question is no, as *amici* believe it to be on the specific facts of this case, then nothing in the Second Circuit opinion even remotely suggests an adequate justification for discriminating against petitioners' speech.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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